DOCKET

PROCEEDINGS AND ORDERS DATE: 101884

CASE NBR 83-1-01759 CFX
SHORT TITLE Rohrer, Hibler & Replogle DOCKETED: Apr 16 1984
VERSUS Perkins, Robert D.

Date	Proceedings and Orders
Apr 16 1984	Petition for writ of certiorari filed.
May 25 1984	Waiver of right of respondent Robert D. Perkins to respond filed.
May 29 1984	DISTRIBUTED. June 14, 1984
Jun 11 1984	Response requested.
Jul 10 1984	Brief of respondent Robert D. Perkins in opposition filed.
Jul 11 1984	REDISTRIBUTED. September 24, 1984
Oct 1 1984	REDISTRIBUTED. October 5, 1984
Oct 9 1984	Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.) Justice Stevens OUT.
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PETITION FOR WRIT OF CERTIORARI

88 - 1759

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROHRER, HIBLER & REPLOGLE, INC.,
Petitioner,

v.

DR. ROBERT D. PERKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Of Counsel:

Dated: April 16, 1984

Pandick Midwest Inc., Chicago • 454-7600

30pp

QUESTIONS PRESENTED

This Petition presents the question of whether the appellate courts should protect the right of a party to contract for a forum of his choosing in which to resolve disputes. If not, then is a party who is denied his chosen forum by an incorrect trial court ruling barred from appeal and forced to defend all his rights in a distant forum before he can seek appellate review? Further, is that party then to be permanently denied appellate review in the original forum of his choosing? The United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Third Circuit are in disagreement regarding this issue. (Appendix, p. 6). Because this issue involved a fundamental question of federal civil procedure about which the two circuits disagree and because this Court has not to date considered this issue, the Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

PARTIES TO THE PROCEEDINGS

Petitioner, Rohrer, Hibler & Replogle, Inc. is a corporation organized under the laws of the State of Delaware authorized to conduct business in the State of Illinois with its principal place of business in Chicago, Illinois.

Dr. Robert D. Perkins is a resident of the State of Georgia and a licensed psychologist. He operates his own psychological consulting firm in Atlanta and has clients throughout the southeastern and southwestern United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROHRER, HIBLER & REPLOGLE, INC.,
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v.

DR. ROBERT D. PERKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Rohrer, Hibler & Replogle, Inc., respectfully requests that a writ of certiorari issue to review the opinion of the Court of Appeals for the Seventh Circuit entered on February 16, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported in Slip Opinion No. 83-2568, which is reproduced as Appendix A to this Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., §§1441, 1332(a)(1).

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE WRIT

In the summer of 1983, a contract dispute arose between Petitioner, Rohrer, Hibler & Replogle, Inc. ("RH&R"), and Respondent, Dr. Robert D. Perkins ("Perkins"). As a result of this dispute, RH&R filed an injunction action in the Circuit Court of Cook County, Illinois pursuant to a contract between the parties which provided that Cook County would be the jurisdiction where such disputes would be resolved. After the Circuit Court issued a temporary injunction against Perkins, he improperly removed this case to the federal court in Chicago. This action violated the contract with RH&R wherein Perkins had expressly agreed to submit himself to the jurisdiction of the Cook County Court. When RH&R sought to remand the case to the state court pursuant to the contractual forum-selection clause, Judge Leighton in the United States District Court refused the remand. The basis of Judge Leighton's ruling was that the forum-selection clause was not a mandatory remedy, but merely permissive. Judge Leighton further immediately announced his intention to transfer the action outside of the State of Illinois entirely to the federal court in Atlanta, Georgia. RH&R sought to appeal the ruling of Judge Leighton to the Seventh Circuit in order to avoid having to litigate the entire dispute between the parties in Atlanta. Pending this appeal, Judge Leighton has taken no further action in the case to date.

The Seventh Circuit, after agreeing to take the appeal over the motion to dismiss the appeal of Perkins, reversed itself on February 16, 1984 and ruled that the order of Judge Leighton was non-final and non-appealable. In making this ruling, the Seventh Circuit expressly rejected the authority cited by RH&R in support of the appellate jurisdiction of the court. RH&R had cited to the Seventh Circuit, *Coastal Steel Corp.* v. *Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 211-12 (3d Cir. 1983), *cert. denied,* 104 S.Ct. 349 (1983). This case advanced three

separate grounds for allowing an interlocutory appeal of a denied motion to dismiss which had decided the issue of the enforceability of a forum-selection clause. The Seventh Circuit rejected the majority opinion in *Coastal Steel* stating:

> "The Third Circuit ruled that the denial of the motion to dismiss was appealable, on a variety of alternative grounds, and reversed. Judge Rosenn's concurrence, which reads like a dissent for the most part, persuasively rebuts the majority's alternative grounds for appellate jurisdiction . . ."

However, having dismissed the opinion of the majority in *Coastal Steel* by relying on Judge Rosenn's concurrence, the Seventh Circuit then performed a deft maneuver of logic and also rejected the independent reason for treating the order as appealable, which was advanced by Judge Rosenn. The only distinction made by the Seventh Circuit in dismissing Judge Rosenn's opinion is that *Coastal Steel* involved a contractual forum-selection clause and English versus American law. From this, the Seventh Circuit blithely reasoned that in the case at bar the Northern District of Illinois and the Circuit Court of Cook County would apply the same law, whereas the English and American courts in *Coastal Steel* would not. This logic, of course, ignores the fact that there is no guarantee of conformity of ruling under choice of law or conflict of law theories between the federal and the state courts in Chicago. Morever, even the Seventh Circuit admits the possibility that Judge Leighton will transfer the Chicago action to Georgia thereby raising the additional possibility that Georgia law will be applied. The Seventh Circuit dismisses this danger by characterizing it as speculative. However, Judge Leighton has already made it clear on the record that he intends to transfer the Chicago litigation to Georgia. If this happens, presumably the Seventh Circuit would still not allow RH&R to seek an appeal from that order, but would reason that the entire proceeding, including an appeal, belongs in the federal court in Georgia. Thus RH&R will be forever foreclosed from the courts of Illinois.

Under this scenario, it is obvious that the appeal of RH&R satisfied both *Coastal Steel* and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Under the three part *Cohen* test, there is no doubt that the order of Judge Leighton conclusively denies to RH&R the right to litigate its disputes with Perkins in the Circuit Court of Cook County, Illinois. It is also clear that this issue of forum-selection is completely separate from the merits of the dispute between RH&R and Perkins. Finally, under the third part of the *Cohen* test, it is obvious that if RH&R is forced to litigate its disputes with Perkins in Georgia, then no form of appellate review can effectively undo the harm of that decision.

Finally, there can be no doubt that the criticism of *Coastal Steel* by the Seventh Circuit is misplaced. It is clear that all three judges in *Coastal Steel* were troubled by the historical tension between allowing fragmented appeals on one hand and completely barring interlocutory appeals to protect particular rights on the other hand. Yet, all three judges were unanimous in their belief that forum-selection clauses involved a fundamental and severable right of parties to choose a common ground upon which to resolve their disputes. All three judges in *Coastal Steel* believed that this right should be protected, if necessary, by interlocutory appellate process. The Seventh Circuit has disagreed with the majority in *Coastal Steel* and relied on the dissent of Judge Rosenn to argue that an appeal should not lie in this case. However, in the same breath, the Seventh Circuit then rejected Judge Rosenn's independent analysis which also concluded that forum-selection clauses belonged in that small category of matters which should be the proper subject of interlocutory appeal. The reasoning of the Seventh Circuit is inconsistent and not persuasive.

CONCLUSION

For the reasons stated above, Petitioner, Rohrer, Hibler & Replogle, Inc. respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Of Counsel:

Dated: April 16, 1984

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2568

ROHRER, HIBLER & REPLOGLE, INC.,
a Delaware corporation,

Plaintiff-Appellant,

v.

DR. ROBERT D. PERKINS,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 83 C 4416—George N. Leighton, *Judge.*

SUBMITTED FEBRUARY 1, 1984*—DECIDED FEBRUARY 16, 1984

Before PELL, WOOD, and CUDAHY, *Circuit Judges.*

PER CURIAM. This case arises out of an employment contract between Dr. Perkins and his former employer, Rohrer, Hibler & Replogle, Inc. ("RHR"). Dr. Perkins filed suit in a federal court in Georgia, seeking a de-

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

claratory judgment that the restrictive covenants in his contract are void and unenforceable. RHR then filed the instant suit in the Circuit Court of Cook County, Illinois, requesting injunctive relief against Dr. Perkins. RHR brought suit in Cook County pursuant to a forum selection clause in the contract, which provides:

> This agreement is to be enforced and interpreted in accordance with the laws of the State of Illinois. Employee agrees that the Circuit Court of Cook County, Illinois shall have jurisdiction to enforce any of the terms of this Agreement and/or to resolve any dispute which arises under this agreement and employee hereby consents to and submits to the jurisdiction of the Circuit Court of Cook County over his person for the purposes of enforcing any terms of this agreement or resolving any disputes which arise under this agreement.

After the Circuit Court issued a temporary injunction, Dr. Perkins removed the case to federal court. RHR filed a motion to remand the case to state court which was denied by the judge below, reconsidered, and denied again. RHR appealed to this court.

The first issue we must consider is whether we have jurisdiction to decide an appeal of an order denying a motion to remand to a state court. RHR contends that jurisdiction over this appeal is conferred by 28 U.S.C. §§ 1291, 1292(a)(1) and 1651.

This court's jurisdiction under § 1291 normally "depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945). An order denying a motion to remand a case to state court cannot, by any stretch of the imagination, be considered "final" within the meaning of § 1291. *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954) ("Obviously, such an order is not final and appealable if standing alone."); *Ex parte Hoard*, 105 U.S. 578 (1881); *Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 877 n.2 (1st Cir. 1983); *Melancon v. Texaco, Inc.*, 659 F.2d 551, 552 (5th Cir. 1981); *Three J Farms, Inc. v. Alton Box Board Co.*, 609 F.2d 112, 114 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Aberle Hosiery Co. v. American Arbitration Ass'n*, 461 F.2d 1005, 1006 (3rd Cir. 1972); *Wilkins v. American Export-Isbrandtsen Lines, Inc.*, 401 F.2d 151 (2d Cir. 1968); 1A J. Moore, B. Ringle & J. Wicker, Moore's Federal Practice ¶ 0.169[2.-3], at 706 (1983); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3914, at 548 (1976).

An order may, however, be appealable under § 1291 if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To come within the collateral order doctrine enunciated in *Cohen*, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. All three conditions must be satisfied for the order to be appealable. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

We need not discuss the first two conditions here because RHR has failed to satisfy the third. We begin with the proposition that the collateral order doctrine, like all exceptions to the finality requirement of § 1291, should be construed narrowly. *Matterhorn, Inc. v. NCR Corp.*, Nos. 82-2371 and 83-2235, slip op. at 9 (7th Cir. February 7, 1984); *Medtronic, Inc. v. Intermedics, Inc.*, No. 83-1826, slip op. at 8 (7th Cir. January 12, 1984) (*Enelow-Ettelson* doctrine); *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1124 (7th Cir. 1983) (§ 1292(a)(1)); *In re General Motors*

Corp. Engine Interchange Litigation, 594 F.2d 1106, 1118 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (collateral order doctrine).

The third *Coopers & Lybrand* condition requires that the appellant demonstrate that "denial of immediate review would render impossible any review whatsoever." *Firestone*, 449 U.S. at 376, *quoting United States v. Ryan*, 402 U.S. 530, 533 (1971). "Thus, for an order to be appealable under the *Cohen* doctrine its consequences for the appellant must be irreversible by subsequent proceedings." *In re UNR Industries, Inc.*, No. 83-1746, slip op. at 10 (7th Cir. January 17, 1984). RHR has made no such showing in the case before us. The district court order denying the motion to remand will be reviewable on appeal from a final judgment. *Ex parte Hoard*, 105 U.S. at 579; *Melancon v. Texaco, Inc.*, 659 F.2d at 553; *Albright v. R. J. Reynolds Tobacco Co.*, 531 F.2d 132, 134 (3d Cir.), *cert. denied*, 426 U.S. 907 (1976); 1A Moore's Federal Practice ¶ 0.169[2.-3], at 706 (1983). *See also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 211-12 (3d Cir.), *cert. denied*, 104 S.Ct. 349 (1983) (Rosenn, J., concurring).

Although RHR will have to incur the cost of further litigation below before finding out whether the district court properly denied the motion to remand, this does not "diffe[r] in any significant way from the harm resulting from other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection or orders denying motions for recusal of the trial judge." *Firestone*, 449 U.S. at 378, *quoting Armstrong v. McAlpin*, 625 F.2d 433, 438 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981). The burden of additional litigation expenses does not make allegedly erroneous interlocutory rulings appealable. *Freeman v. Kohl & Vick Machine Works, Inc.*, 673 F.2d 196, 200 (7th Cir. 1982); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Ins. Co.*, 600 F.2d 671, 677 (7th Cir. 1979).

As alternative bases for our jurisdiction, RHR contends that the order is appealable under either § 1292(a)(1) or § 1651. By the latter statute, the All Writs Act, we assume that RHR is referring to mandamus. A writ of mandamus is an extraordinary remedy reserved for extreme situations. *J.H. Cohn & Co. v. American Appraisal Associates, Inc.*, 628 F.2d 994, 997 (7th Cir. 1980); *Oswald v. McGarr*, 620 F.2d 1190, 1195 (7th Cir. 1980). It does not serve as a substitute for appeal, *J.H. Cohn & Co.*, 628 F.2d at 997, and "will lie only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Mere error is not sufficient to invoke the mandamus process; the petition must assert an action of the lower court by which it acted beyond its power." *Oswald v. McGarr*, 620 F.2d at 1195 (citations omitted). The party requesting mandamus relief has the heavy burden of showing that it has a clear and indisputable right to issuance of the writ. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978). As RHR has made no argument concerning the appropriateness of mandamus beyond merely citing the statute, we hold that it has not met this burden.

Section 1292(a)(1) gives courts of appeals jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." Because the order appealed from here does not involve an injunction, we have jurisdiction under § 1292(a)(1) only if the order comes within the contours of the *Enelow-Ettelson* doctrine (named for the two cases that first announced it, *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935) and *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942)). This rule classifies as an injunction, within the meaning of § 1292(a)(1), a stay issued in a suit at law for the purpose of allowing consideration of an equitable defense. *Matterhorn, Inc. v. NCR Corp.*, slip op. at 5; *Medtronic, Inc. v. Intermedics, Inc.*, slip op. at 2; *Hayes v. Allstate*

Ins. Co., No. 83-1456, slip op. at 9 (7th Cir. December 2, 1983) (Posner, J., dissenting). The *Enelow-Ettelson* doctrine has been much criticized, *see id.*, slip op. at 9-12 (Posner, J., dissenting); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d at 208-09 (Rosenn, J., concurring), and we are reluctant to extend it to a factual situation not approved previously by the Supreme Court, because of the important policy against piecemeal appeals. *Matterhorn, Inc. v. NCR Corp.*, slip op. at 8; *Medtronic, Inc. v. Intermedics, Inc.*, slip op. at 8; *Freeman v. Kohl & Vick Machine Works, Inc.*, 673 F.2d at 201; *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1065 (7th Cir. 1981). The only case cited by RHR concerning *Enelow-Ettelson* is *Coastal Steel Corp.* and we think that the majority's application of the doctrine there is effectively rebutted by Judge Rosenn's able concurrence. 709 F.2d at 208-09. A denial of a motion to remand is not the equivalent of a stay and we will not extend the *Enelow-Ettelson* doctrine to so hold. Moreover, the case before us—in which RHR seeks injunctive relief, an accounting, and damages—would not, in all probability, have been a suit at law in 1891 and thus falls outside the boundaries of *Enelow-Ettelson. See Medtronic, Inc. v. Intermedics, Inc.* Consequently, we hold that we do not have jurisdiction of this appeal under § 1292(a)(1).

RHR's appeal rests almost solely on the hope that this court will follow the Third Circuit's decision in *Coastal Steel.* At issue in that case was a contract with a clause providing that any dispute arising out of the contract was to be determined by English courts in accordance with English law. The defendants' motion to dismiss an action brought in federal court in New Jersey, based on this clause, was denied by the district court. The Third Circuit ruled that the denial of the motion to dismiss was appealable, on a variety of alternative grounds, and reversed. Judge Rosenn's concurrence, which reads like a dissent for the most part, persuasively rebuts the majority's alternative grounds for appellate jurisdiction and we need not repeat his reasoning here. *See* 709 F.2d at 207-12.[1]

Judge Rosenn concurred, however, because he found jurisdiction based on *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). In *Gillespie*, the Court ruled that courts of appeals may, in certain circumstances, review non-final orders within the " 'twilight zone' of finality," *id.* at 152. The Court went on to say that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Id.* at 152-53. Our discretion to review non-final orders under *Gillespie* should be used sparingly. *Coopers & Lybrand*, 437 U.S. at 477 n.30. RHR has not demonstrated that this case warrants the exercise of that discretion. Denial of a motion to remand to a state court presents a far less exigent set of circumstances than existed in *Coastal Steel*, where the issue was whether an American court was the appropriate forum for the litigation. *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and the Court's discussion of the importance of forum selection clauses in international commerce. In contrast to *Coastal Steel*, where the applicable law (English or American) would differ depending on the forum in which the case was tried, the controlling law in the instant case, in its present posture, will be the same whether it is tried in the Northern District of Illinois or the Circuit Court of Cook County. Although a conflict of laws question might arise if Judge Leighton transfers the action to the Northern District of Georgia, where a related matter is pending, he has not yet done so and we will not speculate on his future rulings in this case.

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[1] In addition, Judge Rosenn discussed the majority's application of 28 U.S.C. § 1293, a statute not at issue in the instant case. *See id.* at 204-07.

The appeal is dismissed for lack of jurisdiction.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Honorable George N. Leighton, Judge

Cause No.: 83 C 4416 Date: July 8, 1983

Title of Cause: Rohrer, Hibler & Replogle, Inc. v. Robert D. Perkins

The cause is before the court on numerous motions, however, the court will only address one of those, the motion to remand.

This is a breach of contract action originally filed in the Circuit Court of Cook County and removed to this court. Plaintiff seeks to remand the case to state court on the ground that under a provision in the contract, the Circuit Court of Cook County is the only court which has jurisdiction over this action. The court cannot agree with plaintiff's interpretaion [sic] of the clause. Further, the court questions whether a court's jurisdiction can be contractually limited. Accordingly, the motion to remand the case to the Circuit Court of Cook County is denied.

Honorable George N. Leighton, Judge

Cause No.: 83 C 4416 Date: July 29, 1983

Title of Cause: Rohrer, Hibler & Replogle, Inc. v. Perkins

Motion for Reconsideration

This cause is before the court on the plaintiff's motion for reconsideration of the court's order of July 8, 1983 denying its motion to remand the case to the Circuit Court of Cook County. The motion for reconsideration is granted. Having reconsidered and having reviewed the parties' submissions, the court adheres to its ruling denying the motion to remand. Plaintiff has resolved the court's question as to whether a clause limiting jurisdiction to one forum is enforceable; such clauses have been upheld by the courts. However, the court is still unable to construe the clause at issue here as an exclusive and mandatory forum selection clause. The clause, in the court's view, merely confers jurisdiction on the Circuit Court of Cook County; it contains to specific language excluding jurisdiction elsewhere and will not be so interpreted. *See Keaty v. Freeport Indonesia*, 503 F.2d 955, 957 (5th Cir. 1974); *City of New York v. Pullman*, 477 F.Supp. 439, 441-442 (S.D.N.Y. 1979) Accordingly, the motion to remand is denied.

RESPONDENT'S

BRIEF

No. 83-1759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROHRER, HIBLER & REPLOGLE, INC.,
Petitioner,

v.

DR. ROBERT D. PERKINS,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: July 11, 1984

No. 83-1759

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

ROHRER, HIBLER & REPLOGLE, INC.,

Petitioner,

v.

ROBERT D. PERKINS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Robert D. Perkins, Ph.D. ("Respondent") respectfully requests that the petition of Rohrer, Hibler & Replogle, Inc. ("Petitioner") for writ of certiorari to review the opinion of the Court of Appeals for the Seventh Circuit entered on February 16, 1984, in the above-styled case be denied.

QUESTION PRESENTED

Petitioner overly complicates the issue before the Court. Simply put, the question is whether a trial court's decision that it has jurisdiction over a case is immediately reviewable as a collateral order. Whether the trial court's jurisdictional decision is predicated on its interpretation of a contractual forum selection clause is irrelevant. A court has jurisdiction, or it does not.

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STATEMENT OF THE CASE AND REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

In 1976, Respondent, a licensed psychologist, became employed as the Atlanta Branch Manager of Petitioner. At that time Petitioner had numerous offices throughout the United States and practiced what it refers to as "corporate psychology." The parties executed Petitioner's pre-printed, form employment contract in 1976, which contract automatically renewed itself annually absent notice to the contrary.

In 1977, Petitioner adopted a more stringent pre-printed, form contract for all its psychologists, including Respondent. Petitioner executed it and sent it to Respondent in Georgia for execution. The new contract form contained additional restrictive covenants and a forum selection clause not contained in the 1976 contract. Respondent executed the new 1977 contract even though from his point of view it was a non-negotiable condition of continued employment and not a new contract voluntarily entered into.

The employment relation between the Petitioner and Respondent continued under the 1977 form contract until Respondent's resignation in May, 1983. The form employment contract automatically renewed itself annually absent notice to the contrary. Thus negotiation for pay raises or other contractual modifications to the contract did not take place.

On May 16, 1983, Respondent filed suit in the United States District Court for the Northern District of Georgia seeking declaratory relief concerning the enforceability of the restrictive covenants contained in his form employment contract with Petitioner.

Petitioner responded by filing suit in the Circuit Court of Cook County, Illinois on June 16, 1983. Shortly thereafter, Respondent removed the state court case to the United States District Court for the Northern District of Illinois contending that such court had or could exercise jurisdiction over the case. Petitioner immediately filed a Motion to Remand the case to the Circuit Court of Cook County based on the forum selection clause contained in the employment contract.

Petitioner's Motion to Remand to the Circuit Court of Cook County was denied. The Northern District of Illinois determined that it had jurisdiction over the case. On Petitioner's Motion, the Motion to Remand was reconsidered, and was again denied by the District Court. The court denied the Motion to Remand because the forum selection clause in issue was permissive in nature, and did not mandate litigation in one and only one exclusive forum. The District Court invoked its jurisdiction on the basis of diversity of citizenship pursuant to 28 U.S.C.A. §1932.

Petitioner sought immediate review of the denial of its Motion to Remand to the Circuit Court of Cook County by applying for the required certificate for review of non-final orders under 28 U.S.C.A. §1292(b). The District Court refused to issue a certificate for immediate review. Nevertheless, Petitioner appealed the denial of its Motion to Remand to the Seventh Circuit using several alternative theories, but relied primarily on 28 U.S.C.A. §1291.

The Seventh Circuit found that it had no jurisdiction over Petitioner's appeal under 28 U.S.C.A. §1291. It found that this case did not fall within the ambit of §1291 review because the issue presented was not in "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

Petitioner contends that this case and Coastal Steel Corporation v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3rd Cir.), cert. denied, 104 S.Ct. 349 (1983) are in conflict. Respondent contends that Coastal Steel can be harmonized with this case and that no conflict between Circuits exists. Unique factual

circumstances in Coastal Steel compelled a result different than the result reached by the Seventh Circuit in this case.

In Coastal Steel the Third Circuit found appellate jurisdiction under 28 U.S.C. §1291. In Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) this Court held that Courts of Appeals may, in certain limited circumstances, review non-final orders within the "twilight zone" of finality. Id. at 152. In Coastal Steel Judge Rosenn stated:

> As in Gillespie, the order appealed from [in Coastal Steel] cannot fit within the literal terms of Section 1291, nor does it seem to possess the necessary features of finality as a collateral order under the Cohen doctrine. Yet as in Gillespie, circumstances clearly warrant our review. The questions presented in this appeal are fundamental to the further conduct of the case because they concern the appropriateness of an American Forum.

Coastal Steel, 709 F.2d at 213 (Emphasis Added).

The Seventh Circuit found that this case did not pass muster under the Cohen doctrine and agreed with Judge Rosenn's reasoning and limited application of Gillespie. Judge Rosenn carefully limited the use of the Gillespie rule to the specific facts involved in Coastal Steel. The Seventh Circuit concluded that the "[d]enial of a motion to remand to a state court pre-

sents a far less exigent set of circumstances than existed in Coastal Steel, where the issue was whether an American court was the appropriate forum for the litigation." 728 F.2d at 864.

In Coastal Steel, the trial court's denial of the Motion to Dismiss determined whether litigation was to proceed in an American or a foreign forum. In this case, the denial of Petitioner's Motion to Remand is of far less consequence, since it determined only that the suit will be heard in a federal rather than state forum. If Petitioner's position is in fact correct, a United States Appeals Court will ultimately remand the case to a District Court with instructions to remand the case to the Circuit Court of Cook County, Illinois. Accordingly, there is no final decision causing Petitioner irreparable harm, as required under the Cohen test.

Coastal Steel is distinguishable from this case, and can be harmonized with it. The granting of the Motion to Dismiss in Coastal Steel would have, in effect, deprived a citizen of the American court system. That is why the Third Circuit deemed it sufficiently important to review. Here, the American system, with right of appeal, is not at issue. The Seventh Circuit therefore held that it had no jurisdiction to consider Petitioner's appeal to it. The Seventh Circuit's decision and Coastal Steel are compatible. Petitioner's argument as to forum is preserved inviolate for eventual appeal.

Petitioner contends that while its right to appeal is assured, it is somehow irreparably and permanently injured by the possibility of a conflict of laws should the case be transferred. In fact, the case has been transferred to the Northern District of Georgia.

Petitioner claims that the possibility of a conflict of laws is irreparable and cannot be reviewed. It is this alleged harm which Petitioner contends satisfies the third element of the Cohen test and brings the District Court's refusal to remand the case to state court within the ambit of the Cohen collateral order doctrine. Petitioner's reliance is misplaced.

Inherent in any 28 U.S.C. §1404 transfer motion is the possibility of a conflict of laws question. There is no question, however, that a court's ruling on a Motion to Transfer is not subject to immediate appeal. "It is entirely settled that an order granting or denying a Motion to Transfer under 28 U.S.C.A. §1404(a) is interlocutory and not immediately appealable under 28 U.S.C.A. §1291." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3855, at 301.

The possibility of irreparable harm flowing from the grant or denial of a Motion to Transfer does not satisfy the third prong of the Cohen test. As stated by the Second Circuit:

> It is hard to see how any order could be less than 'final' than one which merely transfers an action for trial from one district to another in the federal judicial system, whether the transferee district is in the same circuit or a different one... . There is simply no basis for thinking that despite twenty years of judicial construction that orders under §1404(a) can be reviewed only by mandamus and then, where the order is within the Court's power, on a most restricted basis, one type of order under §1404(a) has been appealable all along. (per curiam)

D'Ippolito v. American Oil Co., 401 F.2d 764, 765 (2d Cir. 1968).

If transfer motions imbued with their possible conflict of laws questions were immediately appealable as Petitioner suggests, then Circuit Courts and this Court would be inundated with a new category of additional appeals. Such an unhappy result is not in the best interests of the economical administration of justice. Piecemeal litigation would flood the appellate courts.

Petitioner contends that prejudice is created by a federal forum as opposed to a state forum. If such were in fact the case, which prejudice is denied, it is created by virtue of the removal statute. The power to correct that alleged prejudice lies with the legislature alone, and not with the courts.

Insofar as the availability of jurisdiction to appeal under 28 U.S.C.A. 1292(a)(1) and the Enelow-Ettelson doctrine, Respondent states that the order

appealed from does not involve a "stay" and it certainly does not involve an "equitable defense." Accordingly, under this Court's prior rulings the Enelow-Ettelson doctrine is totally inapplicable to this case.

CONCLUSION

For the reasons stated, Respondent requests that this Court deny Petitioner the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari From the United States Court of Appeals for the Seventh Circuit upon James W. Ashley, McDermott, Will & Emery, 111 West Monroe Street, Chicago, Illinois 60603, Attorney for Petitioner, Rohrer, Hibler & Replogle, Inc., by mail duly addressed and postage prepaid.

This 6th day of July, 1984.

J. D. HUMPHRIES, III
Attorney for Respondent

OPINION

SUPREME COURT OF THE UNITED STATES

ROHRER, HIBLER, & REPLOGLE, INC. *v.*
ROBERT D. PERKINS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83–1759. Decided October 9, 1984

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

In 1977, respondent, Dr. Robert Perkins, signed a contract of employment with petitioner Rohrer, Hibler & Replogle, Inc. The contract provided that the Circuit Court of Cook County, Illinois would have jurisdiction over any disputes that might arise between the parties. In 1983, such a dispute arose, and petitioner filed suit against respondent in the Cook County Circuit Court. Respondent removed the suit to the United States District Court for the Northern District of Illinois on grounds of diversity. Arguing that the contract required that the dispute be adjudicated in the Cook County court, petitioner filed a motion to remand to the state court. The district court denied the motion on the ground that the contractual provision was not a mandatory forum selection clause, and petitioner attempted to appeal the ruling.

The Seventh Circuit held that it lacked jurisdiction to hear an interlocutory appeal from the denial of the motion to remand. The court rejected petitioner's theory that the order was appealable under 28 U. S. C. § 1291 because it fell into "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949).

The court noted that there was no reason to believe that the order would be effectively unreviewable on appeal from final judgment. The court also declined to hold the order reviewable under the All Writs Act, 28 U. S. C. § 1651, on the ground that a petition for a writ of mandamus may not be used as a substitute for an appeal. Finally, the court held that the order was not reviewable under 28 U. S. C. § 1292(a)(1), which allows appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Petitioner contended that this provision was applicable by virtue of *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935) and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), which hold that a stay issued to allow consideration of an equitable defense is an "injunction" for purposes of § 1292(a)(1). The Seventh Circuit pointed out, however, that remanding a case to a state court was not the equivalent of issuing a stay; accordingly, the denial of the motion was not appealable under § 1292(a)(1).

In short, the Seventh Circuit held that a district court's interlocutory order declining to give effect to a contractual forum selection clause is not an appealable order under 28 U. S. C. § 1291. This holding appears to place the Seventh Circuit in direct conflict with the Third Circuit, which held a similar order appealable in *Coastal Steel Corp.* v. *Tilghman Wheelabrator Ltd.*, 709 F. 2d 190 (CA3), *cert. denied*, —— U. S. ——, 104 S. Ct. 349 (1983). In *Coastal Steel*, the district court denied defendant's motion to dismiss a contract action on the basis of a contractual provision calling for litigation of any claims under the contract in an English court. The Third Circuit held that it had jurisdiction to hear the appeal under either the *Cohen* v. *Beneficial Industrial Loan Corp.* exception to § 1291's finality requirement, the All Writs Act, or § 1292(a)(1) as interpreted in *Enelow* and *Ettelson*, *supra*.

There is no meaningful distinction between this case and *Coastal Steel*. Indeed, the Seventh Circuit recognized as much when it declined even to attempt to distinguish the holding of the *Coastal Steel* majority. That the forum selection clause in *Coastal Steel* specified a foreign court while the one at issue here designates a domestic forum is of little moment: in both cases, denying immediate review would simply postpone the decision whether the contract requires litigation in another forum until after a trial on the merits. In neither case is the order more or less meaningfully reviewable on appeal from final judgment than in the other. The conflict created by the Third Circuit's decision in this case is inescapable, and this petition should be granted to resolve it. Accordingly, I dissent from the denial of certiorari.

JUSTICE STEVENS took no part in the consideration or decision of this petition.